

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CLYDE DALE EVANS, #34006-177, §
§
Movant/Defendant, § § Civil Action No. **3:09-CV-0944-L**
v. § § No. 3:05-CR-113-L(3)
UNITED STATES OF AMERICA, §
§
Respondent/Plaintiff. §

ORDER

Before the court is the Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody, filed May 1, 2009. The court referred the motion to vacate to United States Magistrate Wm. F. Sanderson, Jr., and he entered his findings, conclusions and recommendation on July 27, 2009. After considering the magistrate judge's report, the motion, record, and applicable law, the court **denies** the Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody.

Movant Clyde Dale Evans ("Evans" or "movant") pleaded guilty to possession of a controlled substance with intent to distribute. Movant was sentenced to 188 months imprisonment. He appealed his conviction, and on December 20, 2007, the Fifth Circuit Court of Appeals granted the government's motion to dismiss the appeal. Movant then filed a letter on May 1, 2009, seeking leave to file a section 2255 motion out of time because of his injuries due to an assault in prison. The magistrate judge granted this request, and movant filed an amended motion on July 20, 2009. He contends that the court made an arithmetic error at sentencing and that his criminal history category was incorrect.

The magistrate judge found that movant concedes that his motion was filed more than a year after his conviction, but that even if he is entitled to equitable tolling of the statute of limitations, the claims raised in his motion are not cognizable under section 2255. He found that under section 2255, a movant may only raise constitutional issues and other injuries that could not have been raised on direct appeal. Movant did not file objections to the magistrate judge's report.

The court has reviewed the magistrate judge's findings and conclusions, the record, and the applicable law, and determines that the findings and conclusions are correct. They are therefore **accepted** as those of the court. The court **denies** the Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody.

It is so ordered this 31st day of August, 2009.



Sam A. Lindsay
United States District Judge